As to the 524 patent, claims 1, 3, 4 and 9 are concerned with the use of ethephon in the method described in claim 1. I found on the evidence that there has been contributory infringement of claims 1, 3 and 4 in that the defendants have induced the planters into committing direct infringement of these claims. It is to be noted that claim 9 has direct reference to rubber trees.

As to the 934 patent, claims 1, 2, 6, 7, 12, 13, 15 and 16 are all concerned with low-intensity tapping as described in the patent in respect of the extraction of latex from the rubber tree following the application thereto of ethephon. The planters using the defendants' product are direct infringers of these claims and the defendants who provided their products to the planters are guilty of contributory infringement.

As to the 870 patent, the claims against which the plaintiffs say there were infringement (claims 1, 2, 3, 4, 6, 7 and 22) are all directed to aqueous compositions (1% to 20% concentration of ethephon) for application to rubber trees to stimulate the flow of latex. The composition has a viscosity of at least 1,000 centipoises and has as a thickening agent a polysaccharide gum.

I acept the evidence of PW4 (the chemist Laurence Helfant), PW1 (Dr. Hardisty) and PW16 (Lim Jin Kok) and find that the defendants' product was in all ways a copy of the plaintiffs' product. I hold that the manufacture and sale of the defendants' product is a direct infringement of these claims irrespective of the purpose for which the defendants' product was sold or for which it was ultimately used.

Claim 23 is a process claim for stimulation of latex yield using any of the compositions referred to in the patent, and by the sale of the defendants' products to the planters, there was contributory infringement on the part of the defendants and direct infringement by the planters using the product.

Accordingly, the declarations prayed for by prayer 1 and 1(a) in paragraph 12 of the statement of claim are hereby granted. The certificate prayed for by prayer 1(b) shall be issued. Further there will be an order in terms of prayers 2, 4 and 5. The defendants will pay the costs of and incidental to this action.

As to the counterclaim, the defendants have not called any evidence and in any event have not even attempted to substantiate the contentions in support of the counterclaim. The evidence produced by the plaintiffs' witnesses and the documents produced in court have not provided any support to the counterclaim. In the circumstances, I am satisfied that the imposition of the interlocutory injunction was just and expedient and that the alleged conspiracy between the plaintiffs and F.E. Zuellig (M) Sdn. Bhd. is without any basis. The counterclaim has to be and is dismissed with costs. Unless notice of appeal is filed before then, the clerk of courts shall return the exhibits in this case to the witnesses who produced them through their relevant solicitors.

Order accordingly.

Solicitors: *Shearn Delamore & Co.; Gill & Tang.*

KESANG LEASING SDN. BHD. v. LONGWOOD SDN. BHD. & 3 ORS.

[A.C.J. (V.C. George J.) 5 August 1987]

[Kuala Lumpur – Civil Suit No. C3590 of 1985]

Civil Procedure – Order 14 application – Hire-purchase agreement – Whether there are triable issues – No basis in equity or in law for raising mitigation as an issue for trial.

Hire-purchase – Hire-purchase agreement – Whether moneylending – Whether sum stipulated is penalty or liquidated damages.

This is an appeal by the plaintiff for leave to enter final judgment as prayed in its Order 14 application.

The case is in respect of three hire-purchase agreements by each of which the plaintiff had let to the first defendant one unit of Caterpillar tractor. The plaintiff contends that the first defendant is in breach of the hire-purchase agreements in that it had fallen in arrears of hire rentals and that none of the vehicles was to be found at the first defendant's address stated in the respective agreements. The plaintiff contends that by these breaches the first defendant had repudiated the agreement. By letter the plaintiff accepted the repudiation and terminated the agreements. The plaintiff claims a specific sum in respect of each of the agreements which it says is a genuine pre-estimate of the damages that the parties had agreed to be paid in the event the first defendant repudiated.

Apart from the contention that the amount claimed is not a genuine pre-estimate of damages, the first defendant does not dispute any of these contentions. The first defendant, however, contends that the hire-purchase agreements were a sham to disguise the true nature of the transaction which in essence was a loan repayable with interest. The first defendant contends that as the plaintiff is not a licensed moneylender, the said hire-purchase agreements are void and unenforceable. The first defendant further contends that, in any event, the plaintiff, by failing to repossess the tractors, has not mitigated the damages. It is also contended that clause 8(i)(d) in the agreement, which provides for the computation of the damages and by which the damages claimed is computed in the statement of claim, is a penalty clause.

Held, allowing the appeal: (1) the question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract as at the time of the making of the contract (and not as at the time of the breach);

(2) the two significant factors that have to be taken into consideration in any formula for computation of the damages suffered arising out of the termination of a hire-purchase agreement are the value of the goods repossessed and the discount that should be given for the accelerated payments effected on premature termination;

(3) that the parties have agreed that any number of situations, acts or omissions, some trivial in nature and others major, could bring the agreement to an end is not relevant to the question of damages. The damage suffered by the premature termination of an agreement is not any the less where the cause of the termination is of a trivial nature than where the cause of the termination is not trivial. The damage is suffered not because of what caused the agreement to be terminated but because the agreement was terminated;

(4) there is no basis in equity or in law for raising mitigation as an issue for trial;

(5) the background correspondence leading to there being the hire-purchase agreements, the contents of those agreements and the related documentation all dove-tail to the conclusion that there is no call to question the genuineness of the hire-purchase agreements;

(6) there are no triable issues between the plaintiff and the second, third and fourth defendants as well.

Cases referred to:

(1) *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.* [1915] A.C. 79, 86, 87, 88 (refd).
(2) *Bhai Panna Singh* v. *Bhai Arjun Singh* A.I.R. 1929 P.C. 179 (cited).
(3) *Wearne Bros. (M) Ltd.* v. *Jackson* [1966] 2 M.L.J. 155, 156 (refd).
(4) *Lord Elphinstone* v. *Monkland Iron & Coal Co.* (1886) 11 App. Cas. 332 (cited).
(5) *Premor Ltd.* v. *Shaw Brothers* [1964] 1 W.L.R. 978, 980 (refd).
(6) *Olds Discount Co. Ltd.* v. *John Playfair Ltd.* [1938] 3 All E.R. 275 (folld).

APPEAL TO JUDGE IN CHAMBERS.

K. Anantham (*Hishammuddin Hussein Onn* with him) for the plaintiff.

S. Sockanathan for the first defendant.

K.H. Koh (*Darshan Singh* with him) for the second, third and fourth defendants.

Cur. Adv. Vult.

V.C. George J.: By a letter dated 11 October 1983 (exhibit LSK-1 to enclosure (9)), a company called Choice Leasing Sdn. Bhd. (Choice) which apparently is a member of what is referred to as the DEP group of companies wrote to the plaintiff (Kesang) introducing itself and the DEP group, *inter alia*, as experts on heavy equipment seeking what it called an "agency line of $5 million". Some extracts from the long letter is illuminative:

"(Choice) was established on September 8, 1982 as a joint venture in-house credit company providing hire-purchase and leasing finance to the customers of the DEP group ... The companies under the DEP (Group) ... are:

DEP International Private Limited.
DEP Trading (Singapore) Pte. Ltd.
DEP Trading (Malaysia) Sdn. Bhd.
DEP Trading (Sarawak) Sdn. Bhd.
DEP Trading (Sabah) Sdn. Bhd. ...

... The key persons in the management of the joint-venture company are:

Mr. Tee Kim Seng
Mr. Tay Chin Chong
...

Mr. Wong Peng Choon is the executive director and Mr. Fam Hock Ann is the business adviser to the company ...

... Mr. Tay Chin Chong was formerly from Tractors Malaysia Bhd. ...

... Mr. Fam Hock Ann is 50 years old. ... more than 28 years experience in heavy machinery/equipment trade. He started his career by joining the heavy equipment division, Sime Darby Singapore ... promoted sales manager ... 1974 he was promoted to general manager and made a director of Tractors Malaysia Bhd. in 1975. He was deputy managing director when he left the company ... He left (Tractors Malaysia Bhd.) in September 1981 to start the DEP group of companies ...

... The company will sign a master recourse agreement guaranteeing the facilities and on similar terms granted by our existing financiers ...

... The in-house credit company will initially finance approx. 30% of the customers of DEP. The estimated hire-purchase and leasing finance are:

	Year 1	*Year 2*	*Year 3*
Hire Purchase	$15.0 m	$30.0 m	$45.0 m
Leasing	2.0 m	3.0 m	5.0 m
	$17.0 m	$33.0 m	$50.0 m

... The main objective of the DEP group of companies is to concentrate on the heavy equipment and spare parts business in Peninsular Malaysia, Sarawak, Sabah and Singapore ...

... DEP's management team is well experienced ... in the heavy equipment business ... Led by Mr. Fam Hock Ann ... DEP understands ... the key ... to provide customers with the best possible service ... The prices of DEP's products are competitive and backed by good after-sale services ...

... The market potential is substantial ... The DEP group deals in all products relating to the heavy equipment industry and concentrating on brands like Caterpillar and attachment like Hyster, Takeda winches, Kyoshin logforks, *etc* ..."

Kesang's reply is exhibited as LSK-3 to enclosure (9) dated 18 October 1983. It is entitled "credit limit of M$2.0 million". The whole of that letter is reproduced:

"We are pleased to confirm our approval of the above facilities for your utilization subject to the following terms and conditions:

(1) Hire Purchase (Reconditioned & New Equipment)
Interest fee : 12% p.a.
Min. deposit : 25%
Max. term : 36 months
Commission term : 1% p.a. of amount financed. Amount to be refunded upon finalization of the individual accounts.

(2) The year model of the equipment must not be more than 8 years old for both hire purchase and leasing.

(3) All transactions must be within Malaysian territories.

(4) We reserve the right to vet all cases and to reject deals that are non-standard or unacceptable to us.

(5) All deals mut be presubmitted one week before delivery of the machine.

(6) If the customer is in default of four (4) successive instalments and we have failed in our attempts to collect or repossess the machine, you will have to repurchase the agreement from us under the term for our recourse and repurchase agreement within 30 days from the date of our request.

(7) Upon such settlement of the customer's account, we will assign all our rights to you under the lease or hire purchase agreement.

(8) Collections will be done by us directly from the customers or with your assistance if it is out of West Malaysian territories.

We trust the above will be acceptable to you and we look forward to receive your confirmation by return mail on the duplicate copy of this letter.

Our documents were earlier handed to you and shall await for an affirmative answer from you in due course.

Yours faithfully,
for Kesang Leasing Sdn. Bhd

Sd .....
Michael Wong
Executive Director"

Apparently in anticipation of Kesang agreeing to provide the financing, Choice wrote its letter dated 12 October 1983 to Kesang – exhibit LSK-2 to enclosure (9). The first two pages of this letter is reproduced:

"Two (2) units Caterpillar 966C c/w Logford for $420,000; Year 1979, Serial No. 78G4010, 78G4121

We write to seek your approval to finance the above equipment and furnish below the following information:

Subject : DEP Plant & Equipment (Sabah) Sdn. Bhd.

Registered address : 38B Jalan 20/16A, Petaling Jaya Selangor

Date of incorporation : 6 December 1982

Commencement of business : July 1983

Nature of business: : Sub-contract works, sales and service of heavy equipment

Authorized capital : $2.0 million

Paid-up capital : The paid-up capital of the company is presently $50,000 but by the end of the year, the paid-up capital will be increased to $100,000

Shareholders : The shareholders of the company are:

Shareholders	Percentage
DEP Management Services (M) Sdn. Bhd.	45
Fam Hock Ann	20
Goh Kee San	15
Albert Tay Chin Chong	10
Ng Joo Kheong	5
Phoon Meng Sin	5
	100

Directors : Mr. Fam Hock Ann
Mr. Goh Kee San
Mr. Albert Tay Chin Chong
Mr. Ng Joo Kheong
Mr. Phoon Meng Sin

Brief notes on directors	:	The directors of the company are mostly on the board of DEP and their resume are mentioned in our application letter dated 11 October 1983.
Facilities required	:	Industrial hire purchase
Cost of equipment	:	$420,000
Amount of finance	:	$336,000
Duration of loan	:	24 months
Equipment (a)		One unit caterpillar 996C c/w Logfork Year 1979 Serial No. 78G4010
(b)		One unit Caterpillar Year 1979 Serial No. 78G4121
Vendor	:	DEP Trading (Sabah) Sdn. Bhd.
Purpose of loan	:	To finance the purchase of machinery/equipment to be used for its subcontract works in Sapangar Bay, Kota Kinabalu ..."

In keeping with their undertaking to execute a master recourse agreement, Choice duly executed a master repurchase agreement in favour of Kesang on 21 October 1983. This is exhibited as YKK–25 to enclosure (10). The opening words of the agreement are interesting:

"To Kesang Leasing Sdn. Bhd.
During the course of our (*i.e.* Choice) business we receive offers from customers who wish to take goods on hire-purchase. We intend to give you the opportunity of accepting this hire-purchase business and we therefore propose to submit to you offers addressed to you signed by prospective hirers (hereinafter referred to as "hire-purchase offers"). Every submission by us to you of a hire-purchase offer will imply an offer by us to contract with you on the follower terms and conditions: ..."

Parts of clause 2 of the terms and conditions are reproduced:

"2. You may unless we inform you to the contrary in writing before you accept the hire-purchase offers rely upon the facts that:

(a) we have verified the hirer's statements made in connection with the hire-purchase offer and have found them to be correct;

(b) the goods accord in all respects with the description thereof (including the stated year model if the goods comprise a second-hand vehicle) in the hire-purchase offer, and are fit for the purpose that the proposed hirer intends to use them;

(c) the cash price stated in the hire-purchase offer represents the true market value of the goods and is the price at which at the time of signing the offer the hirer might have purchased the goods for cash had he been a cash buyer;

(d) if the goods are second-hand, we have found after careful and thorough examination and testing that they are in a sound and serviceable condition and if they comprise a second-hand vehicle, we also warrant that the vehicle has not at any time been operated as a taxi or private hire car unless such operation is disclosed to you in writing at the time of submitting the hire-purchase offer;

(e) such part of the deposit shown in the hire-purchase offer as cash was actually paid to us in cash before signature of the hire-purchase offer and such part of the deposit as is shown in the hire-purchase offer as trade-in allowance is true and correct and represents the true market value of the goods actually delivered to us as a trade-in before the hire-purchase offer was signed by the hirer and that the description of the goods traded-in shown in the hire-purchase offer is true and correct in every particular."

By letter dated 9 December 1983, Choice applied to Kesang to increase the limit of $2 million. The letter was entitled "Re: Purchase/Leasing Facilities – additional $2.0 million". It continues: "We refer to the above matter and write to apply for an additional $2.0 million facilities ..." Then comes a glowing report of what the DEP group has been doing and intends to do, of the state of the nation and of the economy of the nation and towards the end of the letter is this paragraph:

"Financing:

The financing facilities are arranged mainly to the shareholders of the DEP group due to the depressed market condition. Financing activities will be extended to non-shareholders on improvement of the economy. However, the financing arrangement to non-shareholders will be on a very selective basis and only to parties known to the DEP group ..."

By a letter dated 25 October 1983, Choice had apparently written to Kesang seeking a reduction of the minimum deposit that had been imposed by Kesang of 25% to 20% and seeking a higher rate of commission. Kesang's reply was dated 7 November 1983. They agreed to the reduction of the deposit to not less than 20%. They were not prepared to increase the commission.

These documents show that Kesang and Choice had arrived at an understanding that Choice, as a dealer of heavy equipment, would introduce to Kesang such of their customers who wished to purchase equipment by means of hire-purchase. As has been seen, the terms and conditions of the relationship between Kesang and Choice are set

out in the repurchase agreement. The equipment would be sold to Kesang who were entitled to rely entirely on their dealer Choice in respect of all aspects of the goods including the quality and condition of the goods and its market value. Choice was held out to be managed and advised by experts on heavy equipment. The deposit (agreed as has been seen at a minimum of 20% of the selling price) was to be collected by Choice as dealer and Kesang was to rely on Choice to ensure that that was done. This seems to be in accord with the normal relationship between a hire-purchase company and one of its dealers. The conduct of the parties thereafter is also consistent with a normal relationship between a dealer and a hire-purchase company.

Customers of Choice requiring hire-purchase facilities were from time to time introduced by Choice to Kesang. The letter LSK-2 was such an introduction in respect of a company called DEP Plant and Equipment (Sabah) Sdn. Bhd. which apparently wanted to buy two units of heavy equipment by hire-purchase. The letter ran into four pages containing information designed, it seems to me, to satisfy Kesang that the transaction was genuine – that there was a need for the equipment to be purchased and the viability of the project in which the equipment was to be used. The exhibit YYK-27 to enclosure (10) is another such introduction, this time of a company called Longwood Sdn. Bhd., also interested in two units. It is an elaborate five-page "write-up" of the company and the need for it to buy the equipment and the viability of the project for which the equipment was being purchased.

It was also conduct consistent with a genuine hire-purchase situation that Kesang required their claim to ownership endorsed in the registration cards in respect of vehicles the subject of the hire-purchase and that the equipment be comprehensively insured with Kesang as the "owner" beneficiary.

The instant case is in respect of three hire-purchase agreements, by each of which Kesang had let to the first defendant, Longwood Sdn. Bhd., one unit of Caterpillar tractor. The plaintiff contends that the first defendant is in breach of the hire-purchase agreements in that it had fallen in arrears of hire rentals from July 1984 and that none of the vehicles were to be found at the first defendant's address stated in the respective agreements. The plaintiff contends that by these breaches, the first defendant had repudiated the agreement. By a letter written in March 1985, the plaintiff accepted the repudiation and terminated the agreements. The plaintiff claims a specific sum in respect of each of the agreements which it says is a genuine pre-estimate of the damages that the parties had agreed had to be paid in the event the first defendant repudiated.

Apart from the contention that the amount claimed is not a genuine pre-estimate of damages, the first defendant does not dispute any of these contentions. The first defendant, however, contends that the hire-purchase agreements were a sham to disguise the true nature of the transaction which in essence was a loan repayable with interest. The first defendant contends that the plaintiff not being a licensed moneylender, the said hire-purchase agreements are void and unenforceable. The first defendant further contends that in any event the plaintiff has, by failing to repossess the tractors, not mitigated the damages. It is also contended that clause 8(i)(d) in the agreement which provides for the computation of the damages and by which the damages claimed is computed in the statement of claim is a penalty clause.

Encik Sockanathan, counsel for the first defendant, has argued that these issues as raised by the first defendant are triable issues and that there should be unconditional leave to defend.

I will first deal with whether the contention that clause 8(i)(d) is a penalty clause is a triable issue.

In *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage & Motor Co. Ltd.*[1], Lord Dunedin has stated the various propositions deducible from authoritative decisions of the highest English courts on the subject of penalty or liquidated damages. *Inter alia,* it is seen as trite that a genuine covenated pre-estimate of damages is binding on the parties and may be recovered as liquidated damages.

In *Bhai Panna Singh* v. *Bhai Arjun Singh*[2], the Privy Council considered the effect of section 74 of the Indian Contracts Act (which is identical to section 75 of our Contracts Act) and held that the plaintiffs must prove the damages they have suffered unless the sum claimed is a genuine pre-estimate of the damages. The case was cited with approval in *Wearne Bros (M) Ltd.* v. *Jackson*[3].

The question whether a sum stipulated is a penalty or liquidated damages is a question of con-

struction to be decided upon the terms and inherent circumstances of each particular contract as at the time of the making of the contract (and not as at the time of the breach). Various tests to assist in the task of construction have been suggested. In *Lord Elphinstone* v. *Monkland Iron & Coal Co.*[4], it was suggested (and Lord Dunedin accepts that suggestion as authoritative) that there is a presumption (but no more) that it is a penalty when a single lump sum is made payable, by way of compensation, on the occurrence of one or more or all of several events some of which may occasion serious and others but trifling damage.

In the instant case, clause 7 in each of the agreements sets out the circumstances in which the agreement may be terminated and clause 8 the entitlement of the owners in the event of such termination.

Clause 8 provides for the owner to be entitled to arrears of rentals, certain costs and expenses (in respect of which the first defendant does not take issue) and has the said sub-clause (i)(d). The relevant portions of clause 8 are as follows:

"8.(i) In the event of termination of this agreement by either party the hirer shall forthwith deliver to the owner the insurance policy and certificate of insurance and registration book (if any) relating to the goods and the hirer shall upon demand pay to the owner ...

(d) The amount of the owner's loss on the transaction which loss is hereby agreed as being the difference between on the one hand the hire purchase price of the goods and on the other hand the aggregate of (a) the net proceeds of sale of the goods if repossessed and sold (b) the sums previously paid by the hirer by way of deposit and hire rentals and (c) a discount for the acceleration of payment computed according to the direct ratio or rule of 78 method. (The net proceeds of sale shall mean the sale price less the cost and expenses of repossession, storage and sale and any sums expended by the owner in putting the goods into good order and repair for purposes of such sale.)"

Sub-clause (i)(d) sets out the formula for computation of what was agreed to be the pre-estimate of damages. For the defendants, it has been contended that what is computed cannot be said to be a genuine pre-estimate of damages.

The two significant factors that have to be taken into consideration in any formula for computation of the damages suffered arising out of the termination of a hire-purchase agreement are the value of the goods repossessed and the discount that should be given for the accelerated payments effected on premature termination.

As can be seen from clause 8(i)(d), both these factors have been taken into account in the formula, *i.e.* the value of the goods repossessed and the application of the "rule 78" to work out an equitable discount for the accelerated payment.

Encik Sockanathan's substantial complaint on the penalty clause aspect appears to be (as I understand it) that clause 7 provides for both minor transgressions and major misdemeanours to trigger off identical computations and that, in his contention, demonstrates that the formula agreed to by the parties in clause 8(i)(d) does not necessarily provide a genuine pre-estimate of damages. Paragraph 342 of the 14th Ed. of *McGregor on Damages* was referred to.

I am afraid I see no merit in this contention. I do not think that paragraph 342 of *McGregor* supports such a contention. That the parties have agreed that any number of situations, acts or omissions, some trivial in nature and others major, could bring the agreement to an end is not relevant to the question of damages. The damage suffered by the premature termination of an agreement is not any the less where the cause of the termination is of a trivial nature than where the cause of the termination is not trivial. The damage is suffered not because of what caused the agreement to be terminated but because the agreement was terminated.

That the same sum cannot in the same agreement be treated as a penalty for some purposes and as liquidated damage for others (as *McGregor* puts it) is a different matter altogether. The *McGregor* paragraph 342 deals with damages stipulated for breaches of contracts. Clause 7 of the hire-purchase agreement in the instant case deals with various situations which would entitle the owner to terminate the hiring. Clause 8(i) deals with the situation that obtains "in the event of termination of this agreement by either party". And clause 8(i)(d) provides a formula for the computation of loss suffered by the owner which formula has, as has been seen, at least two variables.

I now turn to the complaint that the plaintiff had not mitigated the damages in that they had not repossessed the tractors. I see no basis for that complaint. It does not provide the defendants with a triable issue.

While the Contracts Act does not impose a duty on the plaintiff suing in respect of a breach of

contract to mitigate the damages, a court of equity will be concerned to enquire whether the plaintiff had taken reasonable steps to mitigate the damage. As has been seen, in the instant case, after the agreements were terminated, the plaintiffs have by affidavit said that they could not repossess the tractors because they were not at the address they ought to have been at according to the agreement and that the machines could not be located. No doubt both parties had at all relevant times understood that the tractors would be delivered to subcontractors for use in the jungle. But it is unarguable that at all relevant times the plaintiff had no knowledge of the whereabouts of the tractors while the first defendant would or should have known where the tractors were. The plaintiff had demanded the return of the tractors by letter to the first defendant copied to each of the other defendants and to Choice. The tractors were not returned to the plaintiff and the whereabouts of the tractors were not disclosed to the plaintiffs. In the face of that, the complaint that the plaintiffs had not mitigated their loss by repossessing the tractors is as good an example of adding insult to injury as one could think of. Further, and in any event, there is clause 8(iii) of the agreement which puts this aspect of the matter beyond any argument:

"8.(iii) If the owner shall for any reason whatsoever be unable or unwilling to resume possession of the goods the owner shall be entitled at its option in lieu of resuming possession of the goods to recover on demand from the hirer the balance of the hire instalments which would have been payable by the hirer to complete the purchase of the goods if this agreement had not been terminated less a discount (if any) for the acceleration of payment computed according to the direct ratio or rule of 78 method."

There is no basis in equity or in law for raising mitigation as an issue for trial. The complaint is not made *bona fide,* has no merit, and may be and is rejected out of hand.

Another point made by Encik Sockanathan is that in effect, the plaintiffs are seeking specific performance of the agreement. This may have been a relevant matter for consideration if the suit had been filed before the completion of the agreed period of hiring. However, as the suit was filed well after the whole period of hiring, that in effect the plaintiff seeks an order that will be identical to an order made if the plaintiffs had sought specific performance of the agreement is of academic interest and in my judgment does not prejudice the plaintiffs moving pursuant to Order 14.

I now deal with the moneylending point. In *Premor Ltd.* v. *Shaw Brothers*[5], Lord Denning M.R. said:

"It is now settled law that a hire-purchase finance company, when it carries on the normal business of financing hire-purchase transactions, is not a moneylender within the Act. It would appear to the unpractised eye that a hire-purchase finance company is nothing more or less than a lender of money on the security of cars. But in point of law a hire-purchase company carries on the trade of buying cars and letting them out on hire-purchase. So it is not, in the eyes of the law, a moneylender. That was decided in *Olds Discount Co. Ltd.* v. *John Playfair Ltd* ..."

The gist of the ratio in *Olds Discount Co. Ltd.*[6] may be found at pp. 276E and 280F:

"The plaintiffs are a company who are not registered moneylenders, and who deny that they carry on a moneylending business. Their business is one which is well known from many cases in these courts – namely, the business of financing hire-purchase agreements. In order to carry on that practice, they have certain printed forms of agreement into which they are accustomed to enter with people who are desirous of obtaining the facility which they are prepared to afford ...

The result of the whole thing is that I have before me formal agreements formally entered into and signed by the parties on both sides, and those agreements, if they represent the true agreement between the parties, are clearly not moneylending agreements. Unless there was evidence upon which it would be proper for the court to act that the parties had deliberately entered into those documents knowing that they did not represent what had been agreed between them, but that what had been agreed between them was something quite different, it seems to me that the proper course for the court to take is to accept the formal agreements between the parties, and to decide their rights according to those agreements."

Earlier in this judgment, the pre-agreement correspondence between the parties have been examined. They were lengthy and obviously made at arm's length and the representations made therein are consistent with what the agreements that were eventually entered into represent, *i.e.* hire-purchase agreements in respect of tractors with the first defendant, a customer of the dealer Choice.

Is there anything upon which it would be proper for the court to assume that the parties had deliberately entered into those agreements (and the related documentation, *e.g.* the invoices, insurance covers, claim of ownership of the vehicles *etc.*) knowing that they did not represent what had been agreed between them but that what had been agreed between them was something quite different?

There were four matters brought to the court's attention as being inconsistent with the agreements being genuine hire-purchase agreements:

(i) The plaintiffs did not inspect the tractors.

(ii) The plaintiffs did not ensure that the deposits that were to be paid to the dealer Choice had been paid.

(iii) The hire rentals were paid not by the first defendant but by another company in the DEP group.

(iv) The use of the word "loan" by the plaintiffs in –

(a) LSK-12 to enclosure (9)

(b) YYK-27 (at p. 4) to enclosure (10) and

(c) in the "particulars" given in respect of the second and third hire-purchase agreements in the amended statement of claim.

As to (i) and (ii), it has been seen that the dealer, Choice, had without any false modesty held themselves out in their dealings with the plaintiffs to be experts on tractors and in the repurchase agreement had specifically stated that the plaintiffs may rely on Choice, *inter alia,* in respect of the quality and price of the tractors and in respect of ensuring that the deposit would be collected by them as dealers. In the face of that and in the face of Choice having entered into the repurchase agreement which has them giving what in effect is a full indemnity to the plaintiffs or, to apply an American vulgarism, have put their money where their mouth is, that the defendant did not bother to cause the tractors to be inspected and valued and did not appear to be concerned whether the deposit was paid, or not, are not, in all the circumstances of this case, omissions that are inconsistent with the agreements being genuine hire-purchase agreements. As to (iii), in all the circumstances of the case I am of the opinion nothing turns on the fact that the hire rentals were paid by a third party. From the very beginning, Choice had gone into great detail in demonstrating how the DEP group is made of a number of companies which has, *inter alia,* "in-house" companies providing hire-purchase and leasing facilities to the other companies in the group. In large groups and conglomerates, I think I can take judicial notice that there could be any number of companies managed and serviced by one or more of the companies in the group. In the circumstances, it is not surprising that one of the companies in the group which was not the first defendant had serviced the facility and the suggestion that this is inconsistent with a genuine hire-purchase is without merit.

As to the use of the word "loan" or "loan amount" a couple of times, it seems to me that that was nothing more than some loose drafting. Considering the consistent use of the terms "hire-purchase" and "rental" and such other words consistent with a hire-purchase in the pre-arrangement correspondence, in the formal documentation and in related documents, the odd slip here and there is of no significance. One swallow (or two) does not make a summer.

Individually, each of these matters referred to by counsel amounts to nothing. The cumulative effect of them also falls far short of there being a sufficiency of material to merit the court holding that the transactions between the plaintiffs and the first defendant call for further investigation by trial. The background correspondence leading up to there being the hire-purchase agreements, the contents of those agreements and the related documentation all dove-tail to the conclusion that there is no call to question the genuineness of the hire-purchase agreements.

The commendable scholarship and research that went into the presentation of the arguments of counsel for the defendants/respondents and the presentation itself had to some extent the effect of making it appear that the issues before the court in this appeal from an Order 14 order of the Senior Assistant Registrar were more difficult than they are. In spite of the grand manner in which Choice approached the plaintiffs to persuade them to provide hire-purchase facilities to companies in the DEP group, shorn of the trimmings what you really have are run-of-the-mill hire-purchase agreements where the hirers failed to keep up payments and hung on to the equipment the subject of the agreements.

Counsel for the first defendant/respondent had to and did scrape the bottom of the barrel to try and lay a basis for saying that there are triable issues. But you cannot make bricks out of straw.

The second, third and fourth defendants are sued as guarantors. They rested their case on their contention that if the points taken by the first defendant amounted to triable issues (they supported the first defendant's counsel's arguments)

then whether they are liable would also be a triable issue. In view of the conclusions I have arrived at on the matters raised by or on behalf of the first defendant, I hold that there are no triable issues between the plaintiffs and the second, third and fourth defendants as well.

The appeal is allowed with costs. There will be leave for the plaintiff to enter final judgment as prayed in the Order 14 application enclosure (5).

Appeal allowed.

Solicitors: *Skrine & Co; Chooi & Co.; K.H. Koh; Cheong & Koh.*

GOLDEN WHEEL CREDIT SDN. BHD. v. LIM CHIEW PHENG

[O.C.J. (Mustapha Hussain J.) 8 February 1988]

[Seremban – Originating Summons No. 33 of 1983]

Land Law – Chargor defaulted in payment of loan – Foreclosure proceedings – Public auction of land charged – Legal fees of solicitors – Whether legal fees can be paid out of proceeds of sale at public action – Principles applicable – National Land Code 1965, s. 268(1)(b) – Bankruptcy Act 1967, s. 51(2).

Legal Profession – Legal fees of solicitors – Whether can be paid out of proceeds of land sale at public auction.

The defendant charged his land to the plaintiff for a certain loan. The defendant defaulted in payment of the loan and foreclosure proceedings were taken. The land was later sold at a public auction.

The issue before the present court was whether the legal fees of the plaintiff's solicitors can be deducted from the proceeds of the auction sale and be paid to the plaintiff before the proceeds (or the balance of it) were remitted to the Official Assignee.

Held: the legal fees cannot be deducted and there was nothing to stop the plaintiff from proving its claim in bankruptcy, if at all it is provable and payable legally.

Case referred to:

(1) *Re Woods (Bristol) Limited* [1931] 2 Ch. 320 (folld).

ORIGINATING SUMMONS.

J.G. Bernatt for the plaintiff.

J. Mahinder Singh (Assistant Official Assignee) for the Official Assignee.

Cur. Adv. Vult.

Mustapha Hussain J.: The defendant Lim Chiew Pheng @ Lim Keat Peng on 15 January 1982 charged his land G. No. CT 2571 Lot 3053 Town and District of Seremban to the plaintiff for the sum of $150,000. The charge was registered on 19 January 1982. The defendant defaulted payment, notice under Form 16D of the National Land Code was sent, followed by the originating summons for foreclosure. The originating summons was dated 16 February 1983. The sum owing as on 11 February 1983 was $106,864.25.

Then the High Court on 2 February 1985 on the plaintiff's application for foreclosure made the order that the defendant's land be sold by public auction. Subsequently following a summons for direction, the S.A.R. made the order and fixed the time for the auction, including ordering the plaintiff to deposit $1,000 into court for purpose of the auction, and fixing the reserve price of $380,000.

The plaintiff deposited the $1,000 into court on 4 March 1986.

The auction was successful and the land fetched the price of $381,000. The plaintiff by letter dated 5 July 1986 (see enclosure (24)) claimed ten items of all expenses including the loan and interest due to the plaintiff amounting to $169,308.07; also a note on p. 2 of the letter that the plaintiff's solicitors will tax the costs which would be in the region of $4,500. Enclosure (24) shows the full amount of the plaintiff's bill.

On 20 October 1986, from the proceeds of the auction, $141,084.88 was taken out to pay the following:

(1)	$138,595.68	–	sum due to judgment creditor, the plaintiff, as on 26 September 1985
(2)	$ 809.00	–	payment of quit rent
(3)	$ 680.00	–	valuer's report
(4)	$ 1,000.00	–	refund of plaintiff's deposit
	$141,084.68	–	total

Then, there was a balance of $239,916, now in court, which is to be sent to the Official Assignee but pending the claim now made by the plaintiff and its solicitors.

A bill dated 31 October 1986 put up by the plaintiff to its solicitors (see enclosure (38)) states